Supreme Court, U. S.
FILED
MAR 9 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1380

WILLIE J. PEARY, a/k/a WILLIE J. PEAY,
Petitioner,

—v.—

STATE OF CONNECTICUT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

F. MAC BUCKLEY
Counsel of Record
51 Russ Street
Hartford, Connecticut 06106
(203) 249 - 6548

TABLE OF CONTENTS

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 3

Statement of the Case 3

Reason for Granting the Writ 5

I. Reliance on *State* v. *Crowe* and *State* v. *Woods* Was Misplaced 7

II. The Admission of Said Photograph Violates Rule of *United States* v. *Harrington*, as Affirmed in *Ralls* v. *Manson* (reversing *State* v. *Ralls*) 8

CONCLUSION 13

APPENDICES:

Appendix A(1)—Decision of Connecticut State Supreme Court, 40 Conn. L.J. 1 (September 26, 1978) 1a

Appendix A(2)—Appellant's Motion to Reargue Dated November 17, 1978 ..... 15a

Appendix A(3)—Decision of the Connecticut Supreme Court Denying Defendant's Motion to Reargue 17a

Appendix A(4)—Defendant-Appellant's Motion to Extend Stay of Execution Dated December 14, 1978 ..... 18a

Appendix A(5)—Court's Order Concerning Stay of Execution 20a

PAGE

Appendix B(1)—"Mug Shot" of the Petitioner. 22a

Appendix B(2)—Excerpts from Trial Transcript 23a

Appendix B(3)—Assignment of Errors, Connecticut Supreme Court 31a

TABLE OF CASES

Barnes v. *United States*, 365 F.2d 509 (D.C. Cir. 1966) 10, 11

Ralls v. *Manson*, 375 F. Supp. 1271 (D. Conn. 1974), *rev'd on other grounds*, 503 F.2d 491 (2d Cir. 1974) 6

State v. *Crowe*, 174 Conn. 129, 384 A.2d 340 (1977) 6, 7

State of Connecticut v. *Willie J. Peary, a/k/a Willie J. Peay*, 40 Conn. L.J. 1 (September 26, 1978) 5

State v. *Ralls*, 167 Conn. 408, 419, 356 A.2d 147 (1974) 6

State v. *Woods*, 171 Conn. 610, 348 A.2d 340 (1977) 6, 7, 10

United States v. *Harrington*, 490 F.2d 487 (2d Cir. 1973) 6, 8, 9, 12, 13

United States v. *Reed*, 376 F.2d 226, 228 n.2 (7th Cir. 1967) 11

IN THE

Supreme Court of the United States

October Term, 1978

No. .....

WILLIE J. PEARY, a/k/a WILLIE J. PEAY,
Petitioner,

—v.—

STATE OF CONNECTICUT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The above-named Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Connecticut Supreme Court entered in this proceeding on September 26, 1978.

Opinions Below

The opinion of the Connecticut Supreme Court as reported at 40 Connecticut Law Journal 1 (September 26, 1978) appears in the Petitioner's appendix hereto.

Jurisdiction

The judgment of the Connecticut Supreme Court was entered on September 26, 1978. A timely motion to reargue was denied on December 11, 1978, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

Constitutional Provision Involved
Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Question Presented

Whether or not the prejudicial effect of a front and side view "mug shot" of the Petitioner introduced into evidence by the State, unnecessarily and cumulatively in its case-in-chief, and admitted by the trial court so outweighed its probative value that it deprived Petitioner of a fair trial.

Statement of the Case

Proceedings to Date

In this criminal prosecution, Petitioner was charged in a four-count Information with violations of the Dependency-Producing Drugs Act, Conn. Gen. Stats. §19-443 *et seq.*

Counts One and Three of the Information charged Petitioner with the sale of heroin, a narcotic drug, in violation of §§19-480(a) and 19-452 of the 1969 Supplement to the Connecticut General Statutes on November 2 and November 6, 1970, respectively.

Counts Two and Four of the Information charged Petitioner with the possession of heroin, a narcotic drug, in violation of §§19-481(a) and 19-452 of the 1969 Supplement to the Connecticut General Statutes on November 2 and November 6, 1970, respectively.

The Petitioner pleaded not guilty to all four counts. Trial commenced before a jury of twelve on July 18, 1972. A guilty verdict was returned on July 21, 1972 as to all counts. On August 22, 1972, the trial court accepted the verdict and sentenced Petitioner to an effective term of six (6) to ten (10) years. On September 26, 1978, the Connecticut Supreme Court affirmed the conviction.

Petitioner has served the statutory minimum of four years with computed "good-time." On July 22, 1976, he

posted an appeal bond with full surety and has been at liberty since that time.

Present counsel filed an appearance on Petitioner's behalf on November 1, 1978. On November 17, 1978, Petitioner filed a Motion to Reargue the Appeal which was denied on December 11, 1978. A motion was thereafter filed to extend the stay of execution of Petitioner's sentence while he sought a writ of certiorari from the Supreme Court of the United States. That motion was granted December 18, 1978.

Factual Background

In the State's case-in-chief, an undercover agent, Maunie J. White, testified that he purchased narcotics from the Petitioner at the Petitioner's apartment on both November 2 and November 6, 1970. He also testified that prior to November 2, 1970, he had been at Petitioner's apartment on four occasions and had seen Petitioner twice and knew him to be Willie Peay.

The agent further testified on direct examination that after both the November 2 and November 6, 1970 purchases of narcotics, he selected Petitioner's picture from a "spread" of fifteen photographs as the man who had sold him drugs on those dates. A front and side view "mug shot" was then shown to this witness who identified it as being that of Petitioner. The mug shot was at that point marked State Exhibit B for identification but not yet shown to the jury. (App. B(1)).

Before completion of the undercover agent's testimony on direct, his supervisor, Sergeant Michael D'Onofrio testified, among other things, that after both the November 2 and November 6, 1970 purchases, the undercover agent picked the Petitioner's photo out of a "spread" of fifteen photographs. D'Onofrio then identified the photograph the agent had selected as that of the Petitioner. (App. B(2),-all).

Rulings on the Issue

After the undercover agent was called back on the stand for redirect examination, the mug shot was admitted into evidence and shown to the jury. The Court made a vain attempt to somehow mask the fact that the photos comprised a "mug shot" by having the clerk put the exhibit marking over where the police tag appears. (App. B(1)).

At no time did defense counsel later on cross-examination of either of these witnesses attack the identification of the undercover agent. All of the testimony concerning identification of this Petitioner and the introduction of said photograph took place on direct examination of these witnesses in the State's case-in-chief.

The Petitioner did later take the stand and denied making either sale. His prior length criminal record was apparently not used to impeach his credibility. It is assumed herein that this was so because it appears Petitioner's prior convictions are, in the main, misdemeanors.

Petitioner's trial counsel made two lengthy and timely objections prior to the admission of the mug-shot evidence, which objections were overruled and exceptions made and noted by the Court. (App. B(2), 4-6). The issue was assigned as error on appeal to the Connecticut Supreme Court, briefed and argued. (App. B(3)-all).

The Connecticut Supreme Court found no error. *State of Connecticut* v. *Willie J. Peary, a/k/a Willie J. Peay*, 40 CONN. L.J. 1, 3 (September 26, 1978). (App. A(i)-all).

REASONS FOR GRANTING THE WRIT

This case raises a substantial federal question not heretofore decided by the United States Supreme Court. Furthermore, the ruling of the Connecticut Supreme Court is contrary to the rulings of federal courts on this precise

issue. *United States* v. *Harrington*, 490 F.2d 487 (2nd Cir. 1973); *Ralls* v. *Manson*, 375 F.Supp. 1271 (D. Conn. 1974), *rev'd on other grounds*, 503 F.2d 491 (2nd Cir. 1974).

Both Petitioner and the State failed to cite *Harrington*, the leading case on this point, in their briefs. Nor did either side, when citing *State* v. *Ralls*, 167 Conn. 408, 419, 356 A.2d 147 (1974), alert the Connecticut Supreme Court, by full citation of the history of *Ralls*, to the fact that the United States District Court in Connecticut, had reversed the decision in *State* v. *Ralls* on this particular point, *inter alia*, *Ralls* v. *Manson*, *supra*.

The complete ruling of the Connecticut Supreme Court on this issue is set out below:

Error has been assigned in the admission as evidence for identification purposes of a "mug shot" of front and side views of the defendant. The agent and his superior identified this picture as the one the agent on November 2 and November 6, 1970, had selected from an array of fifteen photographs as being a picture of the man who sold drugs to him on those dates. The court then permitted the photograph to be admitted as an exhibit for the jury, ordering that the police markings be covered.

"A 'mug shot' is admissible if it is relevant and material and if its probative value outweighs its prejudicial tendency." *State* v. *Crowe*, 174 Conn. 129, 131, 384 A.2d 340. Ths "mug shot" had limited probative value in view of the agent's in-court identification of the defendant as the man who sold him drugs on the two dates alleged and his testimony that he had seen the defendant on two prior occasions. Cf. *State* v. *Crowe*, supra; *State* v. *Woods*, 171 Conn. 610, 613, 370 A.2d 1080. Concealment of any police markings indicating a conviction, however, mitigated the prejudicial effect of the photograph. *State* v. *Woods*, supra. While we caution against the indiscriminate use of "mug shots" for identification; see, generally annot., 30 A.L.R.3d 908; we find no abuse of the trial court's discretion here." 40 Conn, L. J. at (App. A at).

(1)

Reliance on *State* v. *Crowe* and *State* v. *Woods* was Misplaced.

The reliance by the Connecticut Supreme Court on both *State* v. *Crowe*, 174 Conn. 129, 131, 384 A.2d 340 (1977) and *State* v. *Woods*, 171 Conn. 610, 612, 370 A.2d 1080 (1976) was misplaced and erroneous. Both these cases are clearly distinguishable from the instant matter and draw their efficacy from *State* v. *Ralls* and its progeny, which decision was reversed on this particular point in 1974.

The Connecticut Supreme Court cites *Crowe* and *Woods* for the proposition that a "mug shot" is admissible if it is relevant and material and its probative value outweighs its prejudicial tendency.

In *Crowe*, *supra*, the police photo was offered *in rebuttal* only after the co-defendent had denied ever having worn a plaid jacket. The photo showed the co-defendant with a plaid jacket on. Additionally, the co-defendant Kulo, when shown the photo while on the stand in front of the jury, said, "It's a picture of me. This is a police photograph." The Court held the photo was properly admitted *to rebut* Kulo's denial of ever having worn a plaid jacket.

In *Woods*, *supra*, it was found proper to have admitted a "mug shot" with the police markings covered because the court found a jury might well have inferred that the photograph was taken in connection with the instant offense, and furthermore, on voir dire examination defense counsel had suggested the possibility that the de-

fendant's credibility might be impeached by showing a prior conviction if defendant were to take the stand.

Both *Crowe* and *Woods* had totally different factual contexts within which the admission of "mug shots" took place, any justification for admission as in those cases is totally lacking herein.

(2)

The Admission of Said Photograph Violates the Rule of *United States* v. *Harrington*, as Affirmed in *Ralls* v. *Manson* (reversing *State* v. *Ralls*).

In *United States* v. *Harrington*, *supra*, the Court of Appeals for the Second Circuit reversed the conviction by a jury of the United States District Court at Hartford, on the same issue raised in the instant matter. Harrington was charged with possession of stolen property, some $103,000 in stolen checks. During his trial an identification witness as to Harrington's cashing of these checks failed to make an in-court identification of the defendant. At that point the Government tried to salvage this identification by having the witness duplicate in court a previous out-of-court identification he had made from police "mug shots."

The Court of Appeals found "the introduction into evidence of the altered 'mug shots' so prejudicial to his right to a fair trial that we must now reverse his conviction." *Harrington*, *supra* at 490. In view of the totality of the circumstances, Harrington's right to a fair trial was infringed because he was entitled to have the existence of his prior criminal record concealed from the jury.

In reviewing the authorities available on this issue at great length, the Court of Appeals in *Harrington* developed a three-point test to properly permit introduction of "mug shots":

> We perceive three prerequisites to a ruling that the introduction of "mug shot" type of photographs does not result in reversible error:
>
> 1. The Government must have a demonstrable need to introduce the photographs;
>
> 2. The photographs themselves, if shown to the jury, must not imply that the defendant has a prior criminal record; and
>
> 3. The manner of introduction at trial must be such that it does not draw particular attention to the source or implications of the photographs. *Harrington*, *supra* at 494.

We respectfully submit that the introduction of the front and side "mug shot" in *Peay* clearly did not meet "prerequisites 1 and 2" and may not have met #3 either.

(a) The State did not have a demonstrable need to introduce the "mug shot."

The Connecticut Supreme Court clearly recognized in its opinion that the introduction of Petitioner's "mug shot" had "limited probative value." 40 Conn. L.J. at 3. (App. A(1)-p. 3). Clearly the limits of such value do not outweigh its prejudicial effect.

The introduction of the photograph came on direct examination of the undercover agent in the State's case-in-chief. It was not invited by defense counsel nor was it used to rebut the defendant's testimony or to buttress other testimony on direct.

At the point of introduction of the "mug shot," the in-Court identification of the Petitioner by the undercover agent was unchallenged, as was his testimony that he had seen Petitioner on two prior occasions and knew him. Also unchallenged at this point was his testimony, and that of his superior, Sgt. D'Onofrio, that he'd picked

Petitioner's photo out of a spread of fifteen photographs after the sale of November 2, 1970 and again after the sale of November 6, 1970.

No attempt had been made by defense counsel to emasculate any of this identification testimony. Nor was the unnecessary introduction of the "mug shot" invited in any way by defense counsel. Nor was it later somehow retroactively covered by any cross-examination later of the agent or Sgt. D'Onofrio.

The initial identification both out of court and in-court did not come from these photographs. They, therefore, had little or no probative value whatsoever. In fact, when the undercover agent and his supervisor, D'Onofrio, had each properly attested on direct to the act of the agent in selecting Petitioner's photograph from the "spread" on each occasion, there was no further need to dwell on the matter or to enter that picture into evidence. In short, the State had no legitimate interest in introducing the "mug shot" photograph. See *Barnes* v. *United States*, 365 F.2d 509, 510 (D.C. Cir. 1966).

(b) The photographs as shown to the jury implied that the Petitioner had a prior criminal record.

The Connecticut Supreme Court found that the "concealment of any police markings indicating a conviction . . . . mitigated the prejudicial effect of the photograph," citing *State* v. *Woods*, *supra*. In *Woods*, however, as already pointed out, the Connecticut Supreme Court held that the jurors could have drawn the inference that the photos introduced at the trial had been taken at the time of arrest in the matter on trial. Here, however, this inference by the jurors could not be drawn since it was clear the "mug shot" was in existence at the time of each sale of narcotics and thus prior to any arrest pursuant thereto. Any suspicions the jurors might have had about

the source and nature of the front and side photographs would much more logically and inevitably focus on prior criminal conduct and police contact involving the Petitioner.

In the instant case, the clerk put the small square exhibit tag right over the place on the front-view "mug shot" where the little rectangular sign is commonly seen with the Police Department and identification number thereon. Such a covering surely cannot be held to have assuaged the suspicions a juror might have as to the source and nature of the "mug shot." In fact, it may have called their attention to what normally would be hanging where the exhibit tag was placed. (App. B (1)).

The effect of such covering or masking was probably futile in any event. In *Barnes* v. *United States*, *supra*, the Court clearly stated the familiarity with which we all view such a "mug shot":

> "The double-shot picture, with front and profile shots alongside each other, is so familiar from 'wanted' posters in the post office, motion pictures and television, that the inference that the person involved has a criminal record, or had at least been in trouble with the police, is natural, perhaps automatic. The rudimentary tape cover placed over the prison numbers on the photograph, and over the notations on the reverse side, neither disguished the nature of the picture nor avoided the prejudice. If anything, by emphasizing that something was being hidden, the steps taken here to disguise the nature of the picture may well have heightened the importance of the picture and the prejudice in the minds of the jury. *Id.* at 510-511."

It is interesting to note here that other cases have looked to "alternative means" available "to accomplish the purpose for which the pictures were used." See *United*

States v. *Reed*, 376 F.2d 226, 228 n. 2 (7th Cir. 1967). Here, said means clearly was the unchallenged testimony already given by the undercover agent and D'Onofrio as to the selection of Petitioner's photo from the spread on two occasions. That testimony clearly rendered the actual introduction of the "mug shot" selected as merely cumulative at best.

Also, the State could have effected its desired purpose by the use of photographic duplicates without the incriminating indicia or used one view of the defendant, rather than both front and side views, as was suggested in *Harrington, supra.*

(c) The manner of introduction at trial drew particular attention to the source or implications of the photographs.

There was considerable trial testimony from veteran narcotics officers about their long-time familiarity with Petitioner and his premises. There was considerable trial testimony concerning the Petitioner's use (or non-use) of the alias "Peary" and how said alias got on the back of his police photo (again from police officers), which, of course, called attention, once again to these photographs.

Further, counsel's second or third round of objections to the admission of this "mug shot" occurred in front of the jury.

Lastly, a great deal of testimony involved improper questions put to the defendant, whether or not he used an alias, how long and how well he was known to veteran area narcotics personnel, whether his tenant had sold narcotics from his premises (which the Connecticut Supreme Court found prejudicial), how he supported himself, why he kept five "vicious" dogs at his premises, in short, all matters that when viewed in the entire context of Petitioner's trial where this "mug shot" was improperly

introduced, point the jurors like road-signs to the inescapable conclusion that these mug shots came from prior criminal conduct, convictions, or contact with the police, because in the entire context of this trial evidenced that the Petitioner was quite obviously "a bad guy."

The failure to meet any of the prerequisites of the test of admissibility in *Harrington, supra,* clearly, in the context of this trial, rendered the introduction of the "mug shot" so prejudicial as to deny this Petitioner the fair trial to which he was properly entitled as due process of law under the Fifth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Connecticut Supreme Court.

Respectfully submitted,

PETITIONER,
By F. MAC BUCKLEY, Esquire
Counsel of Record
Buckley & Santos
51 Russ Street
Hartford, Connecticut 06106

Dated: March 9, 1979

APPENDICES

APPENDIX A (1)

Decision of Connecticut State Supreme Court, 40 Conn. L.J. 1, (published September 26, 1978)

SUPREME COURT

June Term, 1978

STATE OF CONNECTICUT v. WILLIE J. PEARY

COTTER, C.J., LOISELLE, BOGDANSKI, LONGO and PETERS, JS.

Argued June 9—decision released September 26, 1978

Information in four counts charging the defendant with the crimes of possession and sale of heroin, brought to the Superior Court in Hartford County and tried to the jury before *D. Shea*, J.; verdict and judgment of guilty and appeal by the defendant. *No error.*

Mary V. McCarthy, for the appellant (defendant).

George D. Stoughton, state's attorney, for the appellee (state).

LONGO, J. The defendant was charged in a four-count information with the possession and sale of heroin on two occasions, in violation of General Statutes §§ 19-452 and 19-480(a). He has appealed to this court from the judgment rendered upon a jury verdict of guilty, assigning many errors in the conduct of the trial.[1] We have carefully examined all of the defendant's claims which deserve review and have found nothing to warrant reversal.

The state's chief witness, a former undercover agent for the capitol region crime squad, testified that on November 2, 1970, he was assigned to try to purchase narcotics from Willie J. Peay,[2] the defendant. The agent

---

[1] This appeal was taken prior to the effective date of Practice Book, 1963, § 629A, which dispensed with the requirement of an assignment of errors, a finding and an appendix in a jury case.

[2] As will appear, the designation of the defendant's name on the information is at issue in the case.

met with an informer and together they went to the defendant's apartment in Hartford, where the defendant admitted them. The informer introduced the agent as his cousin. The defendant had about twenty-five glassine envelopes in a cigarette package; he sold two of them to the agent. Those two envelopes were tested and found to contain heroin. On November 6, 1970, the agent returned with the informer to the defendant's apartment and purchased from him two more envelopes which also contained heroin. The defendant denied his presence in the apartment on November 2, and testified that he had not possessed any drugs or sold any drugs to the agent on either of the two dates.

The defendant claims the court erred in not granting a mistrial because of the prosecution's failure to produce the informer as a witness. At the close of the prosecution's case, detectives testified that despite diligent efforts to serve a subpoena, they had been unable to locate the informer at his home or elsewhere. Defense counsel then moved for a mistrial. The motion was denied, but a day's continuance was granted. On the following day the informer was not produced by either side and the mistrial motion was not renewed.

A motion for a mistrial is addressed to the wide discretion of the court; it should be granted if it is apparent to the court that because of some occurrence upon trial the accused cannot have a fair trial and the whole proceedings are vitiated. *State* v. *Hafner*, 168 Conn. 230, 245—46, 362 A.2d 925. We disagree that the informer's absence denied the defendant a fair trial. His testimony was not vital to the state's case, and it is purely speculative for the defendant to insist in the alternative that the informer's testimony would have been favorable to him, as tending to discredit the agent's version of events. See *State* v. *Harris*, 159 Conn. 521, 529, 271 A.2d 74, cert. dismissed, 400 U.S. 1019, 91 S. Ct. 578, 27 L. Ed. 2d 630.

The court acted well within its discretion in not declaring a mistrial.

The defendant was cross-examined regarding his means of support, his involvement in narcotics traffic at and near the time of the two alleged sales, and his reasons for keeping five dogs in his apartment. Those questions were relevant and material to matters raised in the defendant's testimony denying the charges against him. The defendant's objections to them were properly overruled. *State* v. *Brathwaite*, 164 Conn. 617, 619-20, 325 A.2d 284.

The prosecution attempted to extend this inquiry into the defendant's background with a series of irrelevant questions tending to show that the defendant had never held a job and that he had a history of involvement in narcotics traffic and of association with narcotics dealers. The court sustained defense counsel's objections and none of the questions was answered. The defendant's complaint on appeal, that the court did not go far enough, but should have ordered a mistrial or instructed the jury to disregard the questions, merits no consideration. The matter was not raised and ruled on in the trial court; *State* v. *Uriano*, 165 Conn. 104, 106, 328 A.2d 679; and any prosecutorial impropriety falls far short of the serious misconduct needed to bring this case within the "exceptional circumstances" rule of *State* v. *Evans*, 165 Conn. 61, 69, 327 A.2d 576. See *State* v. *Hafner*, *supra*, 251-53.

The defendant contends that the court should not have permitted the agent and his superior to testify as to their familiarity with the defendant, his apartment building, and his apartment. Specifically, the agent testified that he had seen the defendant on two occasions prior to the heroin sales and had been in his apartment four times. The agent's superior testified that he was well acquainted with the defendant's apartment building and had known the defendant for twelve years.

As both men were experts in the narcotics field, the defendant argues that evidence of their familiarity with him and with his dwelling could have prejudiced the jury and led them to believe that the defendant had been involved in drug-related criminal activites in the past. That evidence, otherwise relevant and material, which tends to link an accused with other crimes does not render it inadmissible, if its probative value outweighs its prejudicial tendency. *State* v. *Ralls*, 167 Conn. 408, 417, 356 A2d 147. Whether the defendant twice sold heroin to the agent in his apartment was directly at issue in the case. We cannot say that the trial court abused its discretion in determining that the prejudicial effect of the testimony was outweighed by its probative value.

The defendant claims error in various rulings permitting police officers to testify on rebuttal as to efforts to locate the informer and as to whether the defendant had a tenant selling narcotics in his apartment. The latter testimony, although prejudicial, was in general contradiction of testimony given by the defendant. We find no abuse of discretion in the court's rulings. *State* v. *Fine*, 159 Conn. 296, 301, 268 A.2d 649.

The defendant also complains of related rulings allowing two police officers to testify on cross-examination as to the circumstances of a second arrest of the defendant on a conspiracy charge, shortly after his arrest for the heroin sales. The defendant called the police officers as witnesses in an apparent effort to discredit the factual basis for his arrest on the narcotics charges. The police officers' testimony that the second arrest had an independent basis was within the scope of cross-examination.

Error has been assigned in the admission as evidence for identification purposes of a "mug shot" of front and side views of the defendant. The agent and his superior identified this picture as the one the agent on November

2 and November 6, 1970, had selected from an array of fifteen photographs as being a picture of the man who sold drugs to him on those dates. The court then permitted the photograph to be admitted as an exhibit for the jury, ordering that the police markings be covered.

"A 'mug shot' is admissible if it is relevant and material and if its probative value outweighs its prejudicial tendency." *State* v. *Crowe*, 174 Conn. 129, 131, 384 A.2d 340. This "mug shot" had limited probative value in view of the agent's in-court identification of the defendant as the man who sold him drugs on the two dates alleged and his testimony that he had seen the defendant on two prior occasions. Cf. *State* v. *Crowe*, supra; *State* v. *Woods*, 171 Conn. 610, 613, 370 A.2d 1080. Concealment of any police markings indicating a conviction, however, mitigated the prejudicial effect of the photograph. *State* v. *Woods*, supra. While we caution against the indiscriminate use of "mug shots" for identification; see, generally, annot., 30 A.L.R.3d 908; we find no abuse of the trial court's discretion here.[3]

The defendant further claims that the court erred in denying his motion to have stricken from the information the two aliases by which he was named. The information under which he was prosecuted named the defendant as "Willie J. Peary, alias Willie J. Peay, alias Willie Peay." During the course of the trial the defendant cross-examined several state's witnesses to determine whether they

---

[3] The further objection that the photograph was admitted under circumstances violating the hearsay rule will not be addressed because of the defendant's failure to raise this claim at trial. *State* v. *Evans*, 165 Conn. 61, 67, 327 A.2d 576. No review will be given to two other hearsay claims of the defendant that were not stated with sufficient particularity to apprise the trial court of the basis for the objections. *State* v. *Williams*, 169 Conn. 322, 362, 363 A.2d 72.

had ever known him under the name of "Peary." Each conceded that the defendant had only been known under the name "Peay," the state's main witness stating that the name "Peary" could well have come from the way in which he had written the defendant's name on the back of a photograph of him. Having ascertained this information, the defendant moved that the aliases be stricken, and that the information name him only under his proper name, Willie J. Peay. The defendant reasoned that use of the term "alias" was prejudicial, that the name "Peary" was erroneously supplied by the state, and that the presence or absence of a middle initial does not constitute an alias. The court denied the motion, noting that the aliases had nothing to do with the merits of the case.

At the time of the trial, Practice Book, 1963, § 501 provided that "[i]n an indictment, information or bill of particulars it is sufficient for the purpose of identifying the accused to state his true name *or to state the name, appellation or nickname by which he has been or is known.*"[4] (Emphasis added.) This provision implies that use of an alias in an information is permissible only if the defendant has been or is known under the name designated. In the only previous case in which this court has addressed the issue now posed by the defendant, it was held that the trial court did not err in denying the defendant's motion to expunge from the indictment the alias of "The Cowboy," the court reasoning that "[t]he accused was known by this name and the State had the right to designate him by the alias under which he was known." *State* v. *Cianflone*, 98 Conn. 454, 460, 120 A. 347.

In the present case, the primary name by which the defendant was identified in the information— "Peary"—

[4] This section was repealed as of October 1, 1976.

was neither his proper name nor properly an alias since there was no evidence that he has ever been known by that name. On this basis alone, the court erred in failing to delete the aliases from the information, and substituting the defendant's proper name.[5]

The defendant, however, failed to interpose specifically this basis for his motion. Rather, he argued that use of the term "alias" was prejudicial to him. In *People* v. *Klukofsky*, 201 Misc. 457, 114 N.Y.S.2d 679, the court was similarly confronted with a defendant's motion to have the word "alias" stricken from an indictment on the ground that use of the term would be prejudicial to him in the event of a jury trial. The court agreed, noting, "[c]ertainly, the term has not been used with the intention of impairing in any way the rights of the defendant . . . . However, we would be less than realistic if we did not appreciate that over a period of time the term 'alias' has come to connote in the public mind some previous criminal activity. If that be true, the constant repetition of the word 'alias' might well produce a mental reaction unfavorable to a defendant which, if unexplained by him, could make the presumption [of innocence] of doubtful value." Id., 459-60.

While we are persuaded by the reasoning of this case —that use of the term "alias" may be prejudicial to a defendant tried by a jury—we are not of the opinion

[5] It is noteworthy, too, that at the time of the trial a further section of the Practice Book provided that "[i]f in the course of the proceedings the true name of a person . . . informed against otherwise than by his true name is disclosed by the accused or in the proceedings before the court, it shall order the true name of the accused to be inserted in the . . . information . . . and the proceedings shall be continued against him in his true name." Practice Book, 1963, § 503. (Repealed as of October 1, 1976.) Pursuant to this section, the court should have corrected the information.

that such harm resulted from its use in this case. The names by which the defendant was identified in the information are, essentially, identical, the only difference deriving from the insertion of a middle initial in "Willie J. Peay" and the addtion of an "r" in "Peary." Whatever predisposition may have existed in the minds of the jurors to give "alias" a meaning connoting hidden, covert, or criminal activity would fall before names so close that no identity could be hidden by them. The error was clearly clerical, as the main state's witness conceded. Under these circumstances, we cannot say that even if the court erred in denying the motion, such an error was harmful to the defendant. *State* v. *L'Heureux*, 166 Conn. 312, 323, 348 A.2d 578. By this disposition of the issue, we by no means condone the recitation of aliases in an information, in the absence of some evidence that the accused has, in fact, been known by the designated names.

The defendant next claims that the court erred in admitting into evidence two envelopes which had been used by the police to contain and identify the glassine bags containing the alleged heroin. Each envelope was marked with written notations made by the state's main witness, revealing the defendant's name and address, the date and time of the alleged sales, the amount paid, the name of the officer to whom the sales were made, and, finally, a comment that "envelope contains suspected heroin." The defendant did not object to the admissibility into evidence of the glassine bags, but, rather, he objected to the admissibility of the envelopes in view of the notations. The court admitted the envelopes as business entries, pursuant to General Statutes § 52-180, to which the defendant objected on the grounds that it was not the job of the testifying officer, who had partic-

ipated in the sale and who made the notations, to keep the records of the capitol region crime squad.[6]

General Statutes § 52-180 provides, in part, that "[a]ny writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of such act, transaction, occurrence or event, if the trial judge finds that it was made in the regular course of any business, and that it was the regular course of such business to make such writing or record." The state's main witness testified that he had purchased the glassine bags from the defendant, that it was he who made the notations soon after the sale occurred, that it was his business as a member of the narcotics squad to make such notations on evidence, that it was the customary practice, and that when he made the notations he was acting in the normal course of his duties as an officer. This testimony was sufficient to establish that the requirements of § 52-180 were satisfied. See, e.g., *Bonner* v. *Winter*, Conn. (39 Conn. L.J., No. 44, p. 22); *State* v. *Palozie*, 165 Conn. 288, 294, 334 A.2d 468. The defendant's assertion that it was not the job of the testifying officer who made the notations to keep the records is irrelevant to the question of whether the writings were admissible. The court did not err in overruling the defendant's objection.

---

[6] On appeal, the defendant for the first time claims that the envelopes were inadmissible because they were altered by the writings and hence not valid as original exhibits and because the writing was improper, immaterial, and prejudicial to the defendant. As this court has often stated, a ground for objection not entertained at the trial is generally not subject to review by this court. *State* v. *Williams*, 169 Conn. 322, 332, 363 A.2d 72. No exceptional circumstances warrant suspension of this rule on this issue.

The defendant claims error in that aspect of the court's charge to the jury commonly known as the "*Secondino* charge," by virtue of *Secondino* v. *New Haven Gas Co.*, 147 Conn. 672, 675, 165 A.2d 598. Both parties requested that the court charge the jury that an unfavorable inference could be drawn from the other party's failure to produce as a witness the informer who had, allegedly, participated in the sales. The court charged accordingly,[7] essentially adhering to the requirements delineated in the *Secondino* case. See also *Fontaine* v. *Coyle*, 174 Conn. 204, 206-207, 384 A.2d 616. The defendant excepted to the charge, stating that he agreed with the court "about both sides having found it necessary to draw unfavorable inferences, but I don't think the jury was impressed with the information that if they draw an unfavorable inference on . . . [the informer] being brought it, that it would not be necessary to draw any other unfavorable inferences because the state has to prove his guilt, and the defendant does not have to prove his innocence, because, if they follow that, they will

[7] The relevant portion of the charge is as follows: "In this case, the accused claimed that an unfavorable inference should be drawn from the failure of the state to produce . . . [the informer] as a witness. Both the accused and the state claimed to have made efforts to bring . . . [the informer] to court, but these have been unsuccessful. It appears that both of them at one point or other did contact him some time ago, long prior to the trial. If you conclude that the absence of . . . [the informer] at the trial has not been satisfactorily explained and that he would have been available if a reasonable effort had been made to produce him, you may draw an inference that his testimony would not favor the state if in your judgment it would have been natural for the state to have produced him at this trial. Such an inference might also be drawn with regard to the failure to produce him for the defendant, if you feel it would be more natural for the defendant to have produced him at the trial."

follow that their job was done, because it would follow that . . . [the informer] would not back up . . . [the officer's] testimony."

On appeal, the defendant now claims that the court should have stressed that it would be natural for the state to produce this witness were his testimony to help the state's case and that the state had not made reasonable efforts to locate him. The defendant further claims that the court erred in charging that an unfavorable inference could be drawn against him at all. A comparison of the defendant's stated exception made at trial with the objections briefed on this appeal reveals a non-compliance with the mandate of Practice Book, 1963, § 249, which requires that an exception to the charge "distinctly" state "the matter objected to and the ground of objection." The defendant's stated exception appears to concede that the court properly charged that an inference could be drawn against both parties. The remainder of the objection was insufficient adequately to apprise the court of the deficiency in the charge in a manner which would permit the court to make a correction. Error cannot be predicated on such ambiguous exceptions. *Prystash* v. *Best Medium Publishing Co.*, 157 Conn. 507, 512, 254 A.2d 872; *Worden* v. *Francis*, 148 Conn. 459, 461, 172 A.2d 196. To the extent that the defendant's claim may be of constitutional dimension, this court has previously addressed the issue of whether a charge permitting an unfavorable inference to be drawn against a criminal defendant for failure to produce a witness "'stripped him of his presumption of innocence and shifted from the state its burden of proof'"; *State* v. *Annunziato*, 169 Conn. 517, 536, 363 A.2d 1011, rev'd on other grounds, *United States ex rel. Annunziato* v. *Manson*, 425 F. Sup. 1272 (D. Conn.), aff'd, 566 F.2d 410 (2d Cir.); determining that the claim was without merit. We find no error in that portion of the charge to the jury.

The defendant additionally challenges the court's charge on the role and responsibility of the jurors.[8] It is his contention that the charge "could be interpreted as urging the jurors to reach a quick verdict, and to give up their individual opinions in order that a decision be unanimous." Although the defendant did not specifically raise this objection at trial, we consider it because a fundamental right is involved and review may be made upon the record. *State* v. *Chesney*, 166 Conn. 630, 353 A.2d 783; *State* v. *Evans*, 165 Conn. 61, 327 A.2d 576.

"The possibility of disagreement by the jury is implicit in the requirement of a unanimous verdict and is part of the constitutional safeguard of trial by jury. See *United States* v. *Harris*, 391 F.2d 348, 355 (6th Cir.); *Thaggard* v. *United States*, 354 F.2d 735, 740 (5th Cir.) (Coleman, J., concuring specially); *Jenkins* v. *United States*, 330 F.2d 220, 222 (D.C. Cir.) (Wright, J., dissenting), rev'd, 380 U.S. 445, 85 S. Ct. 1059, 13 L. Ed. 2d 957; *Green* v. *United States*, 309 F.2d 852, 856 (5th Cir.). . . . While a defendant is not entitled to an instruction that a jury may 'hang'; *United States* v. *Sawyers*, 423 F.2d 1335, 1340 (4th Cir.); *United States* v. *Bowles*, 428 F.2d 592, 596 (2d Cir.); cert. denied, 400 U.S. 928, 91 S. Ct. 193, 27 L. Ed. 2d 188; he is entitled to a jury unfettered by an order to decide. *Jenkins* v. *United States*, 380 U.S. 445, 446, 85 S. Ct. 1059, 13 L. Ed. 2d 957." *State* v. *Ralls*, 167 Conn. 408, 421-22, 356 A.2d 147.

[8] The charge was as follows: "Now, the verdict of a jury in a criminal case must be a unanimous one with which all of you agree. Usually, there are some differences of opinion by jurors when they first retire. As reasonable people, they discuss these differences and try to reconcile them. If a jury cannot come to an agreement upon a verdict, the case usually must be tried again before a different jury. A second trial imposes a severe hardship upon the parties involved, the state and the accused. You must therefore make every reasonable effort to come to a verdict. You must listen to what other jurors say. You must not hesitate to reconsider your own opinion. If few of the other jurors do share your viewpoint, you should carefully examine its soundness. All of you have heard the same evidence and the same explanation of the law. As reasonable people, you should ultimately be able to come to some agreement upon a verdict. On the other hand, the verdict must be one with which each juror considers just in his own mind. A juror cannot desert his firm and honest convictions simply in order to reach an agreement which he regards as wrong."

In the present case, the court's charge cannot be said to have either rushed or coerced the jurors. In its essence, the charge tracks that approved in *State* v. *Walters*, 145 Conn. 60, 63-64, 138 A.2d 786, cert. denied, 358 U.S. 46, 79 Ct. 70, 3 L. Ed. 2d 45, in which this court noted (p. 64) that "[t]he accuracy of the charge as a statement of the juror's duty is not open to question. Its use has been approved by the Supreme Court of the United States. *Allen* v. *United States*, 164 U.S. 492, 501, 17 S. Ct. 154, 41 L. Ed. 528. . . . For practical reasons only, its use has customarily been deferred until after a disagreemnt has been reported. *State* v. *Schleifer*, 102 Conn. 708, 725, 130 A. 184." See also *Tough* v. *Ives*, 162 Conn. 274, 278-79, 294 A.2d 67. When read as a whole, the charge adequately apprised the jurors of their individual responsibility both to reconsider their opinions and to hold firm to honest convictions. We cannot say that the courts' charge, when read as a whole, was prejudicial to the defendant.

Finally, the defendant claims that the court erred in accepting a verdict which was contrary to the evidence and the law. We conclude that there was ample evidence from which the jury could reasonably and logically conclude that the defendant was guilty beyond a reasonable doubt as charged, and that the court did not err, as a matter of law, in accepting the jury's verdict. See, e.g., *State*

Appendix A (1)—Decision of Connecticut State Supreme Court, 40 Conn. L.J. 1, (published September 26, 1978)

v. *Ralls*, supra, 415; *State* v. *Cobbs*, 164 Conn. 402, 424, 324 A.2d 234.

There is no error.

In this opinion the other judges concurred.

APPENDIX A (2)

Appellant's Motion to Reargue Dated November 17, 1978

SUPREME COURT

FROM SUPERIOR COURT, HARTFORD COUNTY

Docket No. 7554

STATE OF CONNECTICUT

—vs.—

WILLIE J. PEARY, a/k/a WILLIE J. PEAY

November 17, 1978

The Appellant, WILLIE J. PEAY, through his counsel, F. Mac Buckley, respectfully requests that this Court, pursuant to Rules 703 and 704 of the Supreme Court Rules, permit reargument of his appeal decided by this Court on September 26, 1978, for the following reasons:

1. As to this Court's decisions on Issues II, III, IV, V, and VI as so designated in Appellant's Brief, this Court's rulings were in error on each issue.

2. Specifically, as to this Court's decision of Issue I (as so designated in Appellant's Brief), this Court's decision that the admission of a front and side view "mug shot" was not an abuse of the trial Court's discretion, was clearly in error, in that

(a) it was predicated on the citation of several Connecticut cases that clearly are distinguishable, i.e. *State* v. *Crowe*, 174 Conn. 129, 131, 384 A.2d 340 and *State* v. *Woods*, 171 Conn. 610, 613, 370 A.2d 1080,

(b) it ignored the further progress of *State* v. *Ralls*, 167 Conn. 408, 419, 356 A.2nd 147, as cited in the

Appendix A (2)—Appellant's Motion to Reargue Dated November 17, 1978

State's Brief on Appeal, through the Federal Court system, wherein the holding on this same point in *State* v. *Ralls, supra,* was reversed. See *Ralls* v. *Manson,* 375 Supp. 1271 (D. Conn. 1974), reversed on other grounds, 503 F.2d 491 (2nd Cir. 1974),

(c) it ignored the leading case on this issue, *U.S.* v. *Harrington,* 490 F.2d 487 (2nd Cir. 1973),

(d) it ignored the factual context in which this issue should have been evaluated.

3. If this Court had ruled correctly on the "mug shot" issue, the cumulative effect of such a ruling, when viewed with other error or prejudice that this Court did find (namely on the use of alias' and questions as to whether the appellant had a tenant selling narcotics in his apartment) and the area of certain other prejudicial questions put to the appellant Peay by the prosecutor, should have been that these matters were so prejudicial as to result in the denial of a fair trial as guaranteed by the Due Process Clause to the appellant Peay.

The Appellant also submits a Memorandum of Law on Point 2 above.

WHEREFORE, the Appellant, WILLIE J. PEAY, respectfully requests this Court to hear reargument of his appeal.

APPELLANT, WILLIE J. PEAY
By F. MAC BUCKLEY
F. MAC BUCKLEY
His Attorney
51 Russ Street
Hartford, Conn. 06106

APPENDIX A (3)

Decision of the Connecticut Supreme Court Denying Defendant's Motion to Reargue

NO. 7554

State of Connecticut v. Willie J.

Peary/Peay

November 30, 1978[1]. The defendant's motion to reargue is denied by the court.

Dowling
Reporter of Judicial Decisions

[1] The reporting date, or "publishing date" of the decision is December 11, 1978.

APPENDIX A (4)

Defendant-Appellant's Motion to Extend Stay of Execution Dated December 14, 1978

SUPREME COURT

FROM SUPERIOR COURT J.D. OF HARTFORD

No. 7554

STATE OF CONNECTICUT

Appellee

—vs.—

WILLIE J. PEARY, a/k/a WILLIE J. PEAY

Appellant

December 14, 1978

The Defendant-Appellant in the above-captioned matter, WILLIE J. PEARY a/k/a WILLIE J. PEAY, respectfully moves this Court for a stay of execution of sentence for a ninety (90) day period as provided for in Rule 22, Rules of the Supreme Court of the United States (Title 28, U.S.C.) so that he may petition the Supreme Court of the United States for a Writ of Certiorari from the Judgement of this Court denying Appellant's Motion to Reargue, published by the Chief Clerk on December 11, 1978.

In support of the foregoing request, the Defendant-Appellant respectfully represents:

1. That he is presently free on a $25,000 full surety bond since July 22, 1976 and has been, and presently is, residing in Hartford at 56 Enfield Street, as the sole parent of his minor son.

2. That he has served the statutory minimum of four (4) years of his six to ten (6-10) year sentence with computed "good-time" prior to posting said appeal bond.

Appendix A (4)—Defendant-Appellant's Motion to Extend Stay of Execution Dated December 14, 1978

3. That on November 17, 1978 he filed a Motion to Reargue which was denied by this Court on November 30, 1978 which decision was docketed and published by the Chief Clerk of the Supreme Court on December 11, 1978.

4. That this request is based on his counsel's belief that there are substantive issues with which to petition the Supreme Court of the United States.

5. That the petition to the Supreme Court will not be for the purposes of delay.

WHEREFORE, the Defendant requests:

1. That execution of the remainder of his sentence by stayed for the ninety-day period provided for in Rule 22 of the Rules of the Supreme Court of the United States, said ninety-day period running from the date of publication of the denial of the Motion to Reargue, until March 12, 1978;

2. That his $25,000 full surety bond shall be continued.

THE APPELLANT,
By F. MAC BUCKLEY
F. MAC BUCKLEY
His Attorney

APPENDIX A (5)

Court's Order Concerning Stay of Execution

SUPREME COURT

STATE OF CONNECTICUT

SUPERIOR COURT, JUDICIAL DISTRICT OF HARTFORD

No. 7554
No. 33125

STATE OF CONNECTICUT

—v.—

WILLIE J. PAERY, a/k/a WILLIE J. PEAY

In the above entitled matter, the defendant Willie J. Peary, also known as Willie J. Peay, by his attorney, F. Mac Buckley, having filed a Motion for Stay of Execution of Sentence and Continuance of Bond pending decision on a Petition for Certiorari to the United States Supreme Court, and it appearing that there is reasonable cause to grant the motion for a stay, the motion is granted and execution and enforcement of the judgment in the case is stayed until March 12, 1979, or the sooner decision by the United States Supreme Court of the defendant's petition for a Writ of Certiorari, provided that if the said Petition for Certiorari is granted then the stay shall continue until the decision by that court of the issues raised on the defendant's appeal.

This stay is conditioned upon the filing of a bond by the defendant with the clerk of the Superior Court for the Judicial District of Hartford on or before December 29, 1978, in the amount of $25,000, conditioned that he shall abide by the order and decision of the United States Supreme Court and that in the event that the Writ of Certiorari shall be denied or that his appeal is decided

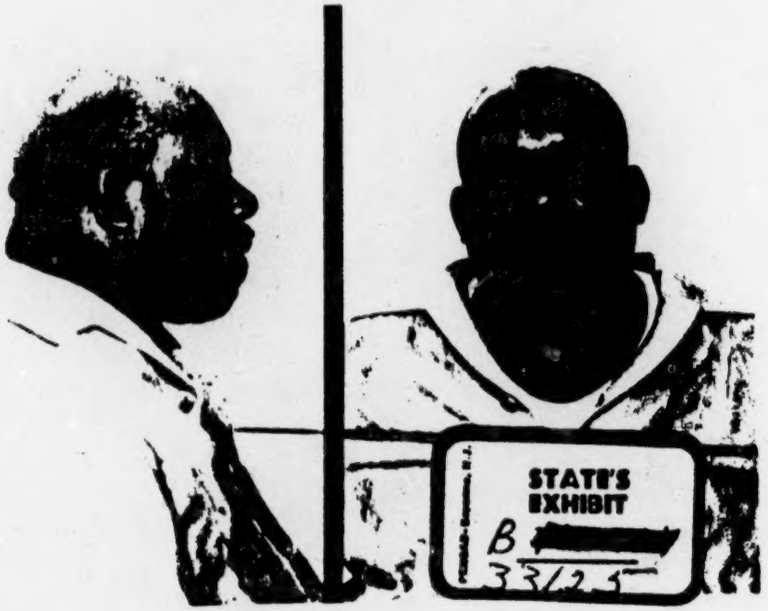
adversely to him, he will promptly thereupon surrender to the sheriff for the Judicial District of Hartford.

Counsel for the defendant, F. Mac Buckley, is directed to give prompt notice to the clerk of the Superior Court for the Judicial District of Hartford and to the Office of Chief State's Attorney, Austin J. McGuigan, and the Office of State's Attorney, George D. Stoughton, of the receipt of any decision by the Supreme Court of the United States on the defendant's Petition for Certiorari.

COTTER
Chief Justice
Connecticut Supreme Court

APPENDIX B (1)

"Mug Shot" of the Petitioner



APPENDIX B (2)

Excerpts From Trial Transcript

I. *Admission of Photograph of Defendant*

1. Maunie White, a former police officer with the Hartford Police Department, called as a State's witness, testified under direct examination:

Q. Were you familiar prior to November 2, 1970 with the premises known as 30 Center Street?

A. Yes. (T. p. 9).

* * *

A. I guess I was in there four times prior to November 2nd.

* * *

Q. And had you any familiarity with the defendant in this case, Willie Peay? Did you know him?

A. Yes, I saw him twice prior to—at 30 Center Street prior to November 2nd.

Q. And had you ever been in his apartment before that date?

A. Yes.

Q. How many occasions?

A. Approximately four times. (T. pp. 12, 13).

* * *

Q. So, that you knew Mr. Peay?

A. Yes, sir. (T. p. 15).

* * *

Q. The man that opened that door, can you identify him at this time?

A. Yes, that defendant over there.

Q. Sitting at the counsel table besides Mr. Zaccagnino?

A. Yes.

Q. Willie Peay?

A. Yes. (T. p. 19).

* * *

A. Did you have anything further to do in reference to identification of Willie Peay?

A. Later on I went and picked a photo of the accused out of approximately fifteen photographs. * * *

Q. You were shown an array of fifteen photographs?

A. Yes, sir. * * *

Q. And from that array, you picked one photograph?

A. Right, sir.

Q. Identified as Willie Peay?

A. Yes, sir. (T. p. 22).

* * *

Q. Did you do anything further in regard to an investigation into this matter?

A. I positively identified a picture. In return, I made out a note of identifying that. (T. p. 23)

* * *

Under cross-examination, the ollowing tetismony was give:

Q. Now, you were there four times and yet met Willie Peay before, why did you have to go down for the picture examination?

A. That is the procedure. We always identify them by photo, as part of the examination. (T. p. 24)

* * *

Under direct examination of Sergeant D'Onofrio, a State's witness, the following took place:

MR. MALONEY: This is preliminary to an examination of Willie Peay, compilation of an array of pictures for Officer Maunie White.

MR. ZACCAGNINO: Well, if they are going to introduce photographs—and while we are here, we might as well discuss it. I think they are trying to get before the Jury a record of the defendant without having him first put on the stand. I will object to that as being highly objectionable. (T. p. 52)

* * *

Q. Did you provide Maunie White with an array of photographs?

A. Yes.

Q. How many pictures?

A. I don't know, ten, twelve or fifteen.

Q. Ten, twelve or fifteen?

A. Yes.

Q. Did Mr. White pick out one photograph from that array?

A. Yes.

Q. Do you have that photograph with you?

A. Yes, I do.

Q. Can you identify that photograph?

A. Yes.

Q. Who is that?

MR. ZACCAGNINO: Your Honor pleases, I am daydreaming here, because I was waiting to make my objection at the end of it, but I will object to the introduction of the photograph and, because it puts before the Jury an alleged portrayal of the defendant, the only purpose of

mugshots is to show people who commit crimes, and they didn't have mugshots for any other reason, and that would be common knowledge of a Jury, and to put before the Jury a record of the accused without showing one—in other words, the only purpose it serves that I know of where crime can be used against an accused is when it is a felony, to attack the credibility of the defendant. Where the defendant has not taken the stand yet, I would object to any mugshots or photographs introduced or any photographs relating to the police.

THE COURT: He didn't offer the photograph.

MR. ZACCAGNINO: Well, we are getting into an area concerning a photograph he is going to bring out where that is Willie Peay.

THE COURT: I can't see any objection to that.

Objection is overruled. (T. pp. 55, 56, 57).

Q. The photograph identified by Officer White, do you have it in your possession?

A. Yes.

Q. And this photograph you have before you, who is the photograph of?

MR. ZACCAGNINO: I would object, Your Honor,

THE COURT: Overruled.

MR. ZACCAGNINO: On the grounds I stated, that it puts the record—exception noted?

THE COURT: Yes.

A. (continuing) It is a photograph of Willie Peay.

Q. And that is the photograph that Officer White identified on November 2, 1970?

A. Yes, sir.

MR. MALONEY: Thank you. I would offer this. Your Honor.

MR. ZACCAGNINO: Objection on the same grounds, Your Honor, because it puts before the Jury, Your Honor, the record of the accused and the sole purpose of the record is to attack his credibility. The fact that the police would have a police identification photograph of him in this crime when he has not even taken the stand, and the sole purpose of crimes, prior crimes, as I know them, would be to attack one's credibility.

MR. MALONEY: With respect to prior crimes, we would be glad to mask the back of the photograph.

* * *

THE COURT: Well, I think the tag here should be either cut off or taken off in some fashion.

MR. ZACCAGNINO: I don't think that is going to serve the job, because the Jury is going to know you covered the tag.

THE COURT: If we cut it out—well, I don't care, the Clerk suggested we put the exhibit marking over where the tag appears, which might be all right.

MR. ZACCAGNINO: The only thing, I don't know whether it will ever satisfy my position, and either way I want to object for the record, Your Honor, that it still gets before the Jury the idea that this is a mugshot and a mugshot denotes the commission of a crime, and all those conditions go against his getting a fair trial under the circumstances, because the exhibit is in, and it is to attack the credibility, what effect it is doing here is really to prove a commission of this crime by offering corroboration of some kind of Officer White, and that is the basis of my objection.

THE COURT: All right. I will overrule the objection. Of course, I think this ought to be at this point marked for identification. (Pgs. 57, 58, 59).

* * *

Q. Showing you State's Exhibit B for identification only, 33125, is that the photograph that Detective Maunie White picked out that is in front of you?

A. Yes, it is.

Q. Will you identify the person in that photograph?

A. Willie Peay.

Q. Is that the defendant in this action?

A. Yes. (T. p. 59).

* * *

Q. And this photograph, B for identification for the State, you have identified that as a photograph of Willie Peay, Willie J. Peay?

A. Yes, sir, that is a notice too of Willie Peay.

Q. That is the defendant in this case?

A. Yes.

Q. And that is the photograph out of the ten, twelve or fifteen photographs that Officer White had picked?

A. Yes, sir. (T. p. 63).

Under redirect examination, Maunie White testified as follows:

Q. Mr. White, I show you a photograph identified by Officer D'Onofrio as Willie Peay. Do you recognize that photograph?

A. Yes, that is him.

Q. Is that the photograph you picked out from the array that was given to you by Detective D'Onofrio?

A. Yes.

Q. Do you recognize that as the man also who sold narcotic drugs to you both on November 2nd and November 6th?

A. Yes, I do.

MR. MALONEY: I offer that, Your Honor.

MR. ZACCAGNINO: May I state objections to what I stated in the absence of the Jury, and I am going to make a formal objection on the grounds I stated before.

THE COURT: Yes, the same objection stated, and it is overruled, and an exception may be noted.

MR. ZACCAGNINO: Exception, Your Honor.

THE COURT: Now, that can be admitted as a full exhibit. It has previously been marked for identification and it would now be Exhibit B in Evidence. (T. pp. 70, 71).

* * *

Under direct examination, in regard to the second alleged sale, Maunie White gave the following testimony:

Q. Did you do anything further relevant to investigation of this case, Officer White?

A. Yes, I again identified the picture, which was in the file already as being the same.

Q. All right. I show you a photograph and ask if you can identify that photograph?

A. Yes, this is the same photograph.

Q. And how great of an array of pictures did you take those photographs from?

A. Well, this was in the file already, and I had to make out identification of it before.

Q. And you identified this man as the same man who sold you the bag on the 2nd?

A. Yes.

Q. Can you identify that photograph at this time?

A. All right. This is the one that I had picked out on this.

Appendix B (2)—Excerpts From Trial Transcript

Q. And who is that?

A. Willie Peay.

Q. The same as the defendant in this case?

A. Yes, sir. * * *

Q. All right, and do you now say this is the man from whom you purchased heroin on the 2nd and the 6th of November?

A. Yes, sir.

MR. MALONEY: I would offer this in respect to this case, Your Honor.

MR. ZACCAGNINO: May the same objection be noted as before, Your Honor, and may I have an exception?

THE COURT: Yes, objection overruled and exception noted. (T. pp. 94, 95).

APPENDIX B (3)

Assignment of Errors

The Court erred:

1. In admitting in evidence a photograph, State's Exhibit B, as stated in paragraphs 1, 2, 3 and 4 of the Finding.

2. In not granting the motion for a mistrial made on behalf of the defendant, appellant, on July 18, 1972, as stated in paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the Finding.

DEFENDANT
By JAMES D. COSGROVE
His Attorney

Filed February 21, 1974.
No corrections.
Shea, J.